



U.S. Department of Justice

Environment and Natural Resources Division

JC:BG:TC

90-5-2-1-2055

Environmental Enforcement Section
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October 19, 2001

Mr. Robert G. Abrams
Howrey, Simon, Arnold & White
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2402

U.S. v. Caterpillar Inc.

Dear Mr. Abrams:

I am responding on behalf of EPA and DOJ to your September 12, 2001 letter regarding Caterpillar's objections to the framework set forth in the United States January 19 and August 17, 2001 letters for reviewing auxiliary emission control devices ("AECs") installed on engines subject to the Amended Consent Decrees' October 2002 "NOx plus NMHC Limits." Your letter demands that the United States retract those letters, and threatens litigation if the United States does not.

The United States' letters respond to concerns by some manufacturers regarding the use of AECs on October 2002 engines. The purpose of the letters was to continue—by setting forth certain preliminary views and ideas—an ongoing dialogue toward resolving the AEC concerns. When we sent the letters, EPA had not received applications for certificates of conformity for NOx plus NMHC Limit engines, and it still has not received any. Thus, contrary to your assertion, EPA has not determined that any particular AEC is acceptable or unacceptable, or may constitute a defeat device, and has not agreed to modify any of the Decrees.

Caterpillar's compliance approach, as it has publicly acknowledged, will not be ready in time for Caterpillar to meet the October 2002 deadline. Other companies are working to meet that deadline. The Decrees provide, as you point out, nonconformance penalties ("NCPs") for those companies that cannot meet the emission standards on time; but NCPs are not a preferred, or even equally valued, alternative. An important goal of the Consent Decrees is to achieve cleaner air through the introduction of new pollution control technologies. The United States does not, as you suggest, prefer one technology over another, but simply prefers cleaner air through compliance with the timetable for introduction of compliant engines. Caterpillar may elect to pay NCPs, to pursue discussions consistent with the government's January 19 and August 17 letters, or to pursue some other compliance path, but our correspondence clearly reflects the government's position that we place greater value on the Decrees' environmental benefits as compared to possible monetary penalties.

Should the United States and any engine maker agree on a modification of a Consent Decree, a proposed amendment would be lodged with the Court, noticed for public comment,

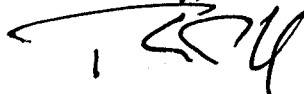
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and entered only upon a motion (assuming we move for entry after reviewing the comments) granted by the Court. Thus, Caterpillar would have an opportunity to review any proposed modification and to make its views known to the United States before any motion to amend would be filed. Clearly, before any amendment is proposed – before the terms of any amendment are even known – Caterpillar's litigation threat is premature. We also see no reason to "retract" letters that do not commit the United States to a particular path, but instead simply provide an approach to discussions.

As you know, our goal of ensuring the Decrees' environmental benefits are realized does not operate to the exclusion of competitiveness concerns. We will take competitive effects into account in evaluating the appropriateness of any modification of the Decrees. That cuts both ways, however, if we perceive Caterpillar's alternatives for addressing the AECD issue (i.e., granting a delay in the October 2002 deadline or imposing NCPs on top of compliance costs) as an effort to gain a competitive advantage over other companies rather than to achieve full compliance with the goals and objectives of the Consent Decrees. This would be particularly inappropriate where Caterpillar could have complied with the deadline (as it advised the Court at the December 2000 status conference) but chose not to for business reasons. Caterpillar's suggestions could also lead to adverse and unacceptable environmental consequences. The NCP alternative in your letter, for example, which appears to contemplate the payment of NCPs on top of the costs of manufacturing engines meeting the standards on the applicable tests, could jeopardize the entire 1.2 million ton reduction in ozone-promoting NOx emissions contemplated by the October 2002 requirements.

If you have any questions, please call me at (202) 514-4051.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Carroll', with a stylized flourish extending from the end.

Thomas P. Carroll

cc: Bruce C. Buckheit
Karl Simon